No. 1166 69

IN THE

Supreme Court of the United States

October Term, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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Case Cited

IN THE

Supreme Court of the United States

October Term, 1966

No. 1168

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
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I.

The Solicitor General's disinterested concurrence in our petition for certiorari is challenged by the Pacific Maritime Association ("PMA") as "predicated" upon "two fundamental misconceptions of fact" (PMA 2).* These "misconceptions" are asserted to be contrary to

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* "PMA" when enclosed in parentheses refers to the "Answer of Intervenor Pacific Maritime Association to Memorandum for the United States"; "SG," to the "Memorandum for the United States"; and "FMC," to the "Brief for the Federal Maritime Commission in Opposition". As before, "R" refers to the Joint Appendix printed for the court below.

conclusions of the Federal Maritime Commission and the Court of Appeals insulated from review under the substantial evidence rule.*

Each step of this syllogism is vulnerable. The Solicitor General had not misconceived the facts; neither of the two factual issues raised by PMA entered into the decisions below; and the sole relevant finding to which the substantial evidence rule applies is adverse to PMA. Finally, neither issue is fundamental; both are, at best, peripheral.

A.

The Solicitor General is charged with failure to understand that PMA's tonnage tax was "part and parcel of the ILWU-PMA Mechanization Agreement" (PMA 6). In fact, the question of how the Fund was to be raised was deliberately excluded from this collective bargaining agreement at the insistence of PMA (Ex. IC, pp. 7-8; R. 284a). As the Commission found, "The method of collecting the

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* Further to discredit the Solicitor General's thoughtful analysis, PMA advises the Court that his memorandum "contains many misstatements of fact." A single example, described as involving a "most flagrant disregard of the record" (PMA 2 n. 1), is cited, *i.e.*, the statement that in manifesting automobiles there is no consistent practice regarding the use of weight or measurement (SG 3). Compare this "flagrant disregard of the record" with the Commission's findings on this score:

> "There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight." (R. 669a-670a).

fund from the PMA membership was reserved to PMA" (R. 668a).*

Accordingly, when the Solicitor General states (SG 7) that he recognizes "an exception [from section 15] for agreements that relate solely to collective bargaining or labor relations," he is declaring policy, not addressing the facts of this particular case. Whether or not such an exception exists is not raised by this record.

Exploiting the Solicitor General's policy statement, PMA argues that it would have had to do no more than incorporate *in haec verba* the funding arrangement here involved into its agreement with the union to immunize such arrangement from scrutiny under section 15. It accuses the Solicitor General, therefore, of elevating form over substance (PMA 6).

To answer: First, union consent is by no means an empty formality, *i.e.*, "waxen seals," as PMA suggests. Responsible representatives of labor do not readily lend their authority to inequitable arrangements. Thus, it is meaningful to distinguish between, on the one hand, a cooperative arrangement among competitors serving purely their business interests and, on the other, an industry-wide plan arrived at as a result of collective bargaining.

Second, the agreements that the Solicitor General would exclude from Commission supervision are those "that relate *solely* to collective bargaining or labor relations" (em-

* In an attempt to undercut this finding, PMA quotes at length from the testimony of its late President, Mr. St. Sure (PMA 5). Excised, however, is what is most significant in this evidence: that both Mr. St. Sure and his counsel unquestioningly assumed that PMA could exercise its taxing power, to abolish "whole segments of the industry" (R. 212a). Furthermore, even if PMA had gone to this extreme, the union could have done nothing, under the terms of its collective bargaining agreement; its sole recourse, as Mr. St. Sure implicitly recognized, would have been to reopen negotiations.

phasis supplied). It does not follow that he would take a similar view of contracts which comprehend additional matters. In any event, in our view, even if the Mech Fund were part of a collective bargaining agreement, which it clearly is not, the Commission's jurisdiction under section 15 would in no way be affected, exactly as the Examiner ruled (R. 649a-650a). "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

B.

The second factual point which PMA insists the Solicitor General misunderstands is the impact of the Mech Fund plan upon shippers (PMA 2). The thrust of PMA's argument appears to be that stevedoring charges for particular cargo have not necessarily increased dollar for dollar to match the PMA assessment (PMA 6-12).

But whether rates go up or down because of changes in other elements of cost, customers are necessarily affected by the creation of a new and artificial charge which must be recovered in the price. If petitioner is obligated to make a disproportionate contribution to the Fund, it has been adversely affected even if it pays less than it did formerly, since it has been denied the full benefit of increased labor efficiency. PMA itself acknowledges that "the costs of the Mechanization Plan * * * were among the many costs * * * ultimately reflected in the commodity rate" (PMA 7). The Solicitor General assumes nothing more (SG 6-7).

II.

In opposing our petition for review, the Commission and PMA show how unintelligible is the construction they defend and how essential the need for clarification by this Court. The Commission's contradictory and inconsistent opinion leaves unclear whether the test of a section 15 agreement is its impact upon "carriers and shippers" or upon "outsiders," that is, persons not parties to the agreement (R. 675a).

PMA reads the opinion the first way and argues the facts accordingly. What the Commission determined, PMA says, is that "the funding arrangements were not designed to pass on to carriers and shippers the stevedore's cost of participation in the Plan" (emphasis omitted) (PMA 10). Some of the evidence relied on by PMA as supporting this determination is testimony that PMA, "which consists of stevedores, marine terminals and ocean carriers, would not realistically be so foolish as to fund the Mechanization Agreement by a method that would require the stevedores to shift the mech fund assessments to their carrier customers * * *" (emphasis omitted) (PMA 11). Thus PMA presupposes that the Commission excluded its arrangement on the theory that it affected neither carriers nor shippers.

On the other hand, counsel for the Commission apparently believes the Commission's ruling excluding the PMA agreement from section 15 rested on a finding that it had "no direct impact upon outsiders" (FMC 13). That PMA's carrier members were affected is assumed. In fact, it is urged in support of the Commission that these "common carriers absorbed the assessment" (*ibid.*). PMA's agreement is described as one "among ocean common carriers and marine terminal operators to allocate among themselves the industry labor cost of a collective bargaining agreement" (FMC 2). The question presented, according

to Commission counsel, is whether such an agreement was properly excluded from section 15 (*ibid.*).

In short, two of the most interested parties in this proceeding are wholly unable to agree on how either factually or legally the Commission concluded PMA's cooperative working arrangement to be outside the Shipping Act. It is ironic, therefore, that this Court is urged to accept that agency's construction of section 15 in the interests of "manageable administration" and as drawing a line "as clear as circumstances permit" (FMC 13-14). Our opponents underscore the urgent need for clarification of the issues of transcendent public importance here involved.

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Respectfully submitted,

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